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In the Supreme Court of the United States

OCTOBER TERM, 1969

THOMAS F. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

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Assistant Attorney General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 419 F. 2d 56.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1969. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to February 7, 1970, and the petition was filed on

that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the ruling in petitioner's first appeal —that the speech or debate clause of the Constitution forbade the use in evidence of testimony concerning a speech that he gave as a Member of Congress in a prosecution under the general conspiracy statute —required the dismissal of substantive conflict-of-interest counts of the indictment, unrelated to the speech, on the ground that references to the speech tainted the grand jury's deliberations.

2. Whether, in support of his motion to dismiss the indictment, petitioner was entitled to the production of all grand jury testimony.

STATEMENT

Petitioner and three others were indicted in an eight-count indictment in the United States District Court for the District of Maryland. Count 1 charged a violation of the general conspiracy statute, 18 U.S.C. 371, based in part on the making of a speech by petitioner, while a Representative in Congress, on the floor of the House of Representatives. The other seven counts charged that petitioner, in violation of the conflict of interest statute, 18 U.S.C. 281, received fees to intercede with Justice Department officials to persuade them to postpone and dismiss an indictment. After a trial by jury, petitioner was convicted. The Court of Appeals for the Fourth Circuit reversed on

the ground that the speech or debate clause of Article I, Section 6 of the Constitution, bars a criminal conviction of a Congressman for accepting money to make a speech in Congress. It remanded for a new trial on the substantive counts, holding that evidence concerning the circumstances of this speech tainted his conviction on these counts. 337 F. 2d 180.[1] This Court affirmed the ruling of the court of appeals that the evidence received in the prosecution of petitioner under the general conspiracy statute contravened the speech or debate clause, but it held that the government was not precluded from retrying the conspiracy count if it eliminated all references to the speech aspect of the conspiracy. *United States* v. *Johnson*, 383 U.S. 169, 184-185. This Court did not review the court of appeals' determination that the substantive counts had to be retried because of the admission of evidence concerning the speech (*id.* at 185-186).

On remand, the district court dismissed the conspiracy count. Petitioner waived trial by jury and he was again convicted on the seven substantive counts. He was sentenced to imprisonment for six months on each count, the sentences to run concurrently. The court of appeals affirmed.

ARGUMENT

1. Petitioner contends that the indictment should have been dismissed because the grand jury heard testimony concerning the circumstances of his con-

[1] The convictions of the other defendants were affirmed.

gressional speech. As the court of appeals held, however, a defendant has no right to go behind an indictment, valid on its face, "returned by a legally constituted and unbiased grand jury," to challenge the evidence presented to the grand jury. *Costello* v. *United States*, 350 U.S. 359, 363; *Lawn* v. *United States*, 355 U.S. 339, 348-350; *United States* v. *Blue*, 384 U.S. 251, 255 n. 3; *Holt* v. *United States*, 218 U.S. 245, 247. The receipt of testimony about the speech did not make the grand jury biased. As the court of appeals observed, grand jury bias does not arise from the receipt of incompetent or constitutionally impermissible evidence.[2] Finally, a full answer to petitioner's claim that the substantive counts were invalidated by the testimony relating to the speech is found in the holding of this Court, on review of petitioner's first conviction, that the government was not even precluded from retrying the conspiracy count, purged of elements offensive to the congressional privilege. See 383 U.S. at 184-185.

2. Petitioner had adequate access to the grand jury minutes. He was allowed to examine his own grand jury testimony and the grand jury testimony of all government witnesses. Since the receipt of testimony about the speech before the grand jury furnished no ground for dismissing the indictment, there was no particularized need either for him to have access to all of the grand jury testimony or for the trial court to inspect the grand jury minutes.

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[2] On the motion to quash in the trial court the government pointed out that testimony relating to the speech constituted about 17 per cent of the grand jury testimony.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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